GENERAL AIR FORCE COUNSEL

FRAUD FACTS

DEPUTY GENERAL COUNSEL (ACQUISITION) *No. 4, October 1997*

This is the fourth edition of ***FRAUD FACTS***, a biannual newsletter from the Air Force Deputy General Counsel (Acquisition) (SAF/GCQ).

The purpose of the newsletter is to provide information and feedback to Acquisition Fraud Counsel (AFCs) at all levels concerning the ongoing operation of the Air Force's Procurement Fraud Remedies Program.

BOUNTY HUNTER

Your program manager, contracting officer, or commander wants you to explain the fraud case that a former employee of a large defense contractor has filed against his former employer, ABC Corp.

You began by saying it's a *qui tam* case but then got bogged down in a Latin lesson. Try this instead: "This is a bounty hunter case under the False Claims Act. The person who filed the case—here a former employee of ABC—is sometimes called a bounty hunter. If successful, the bounty hunter gets to keep 15% to 30% of the recovery; the Government gets the rest." Many courts have described *qui tam* provisions as bounty hunter statutes or the relator's share as a bounty. These are descriptive, not pejorative, terms. Feel free to use them if you think they'll help. *Carpe diem!*

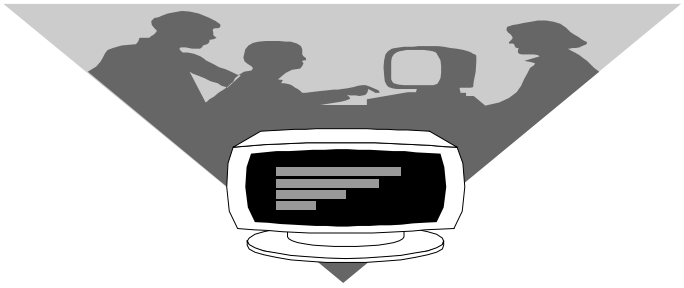
Qui tam? Huh?

DEBARMENT AND SUSPENSION ON-LINE

Where can you find a list of suspended and debarred companies and individuals?

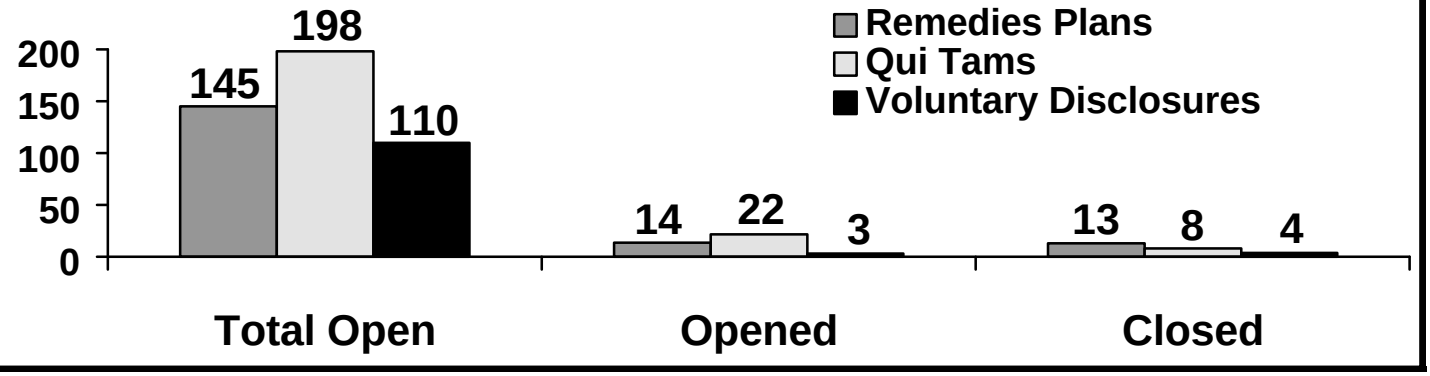
Until recently, the list was only found in a book published periodically by the General Services Administration (GSA). GSA has now made the information available to everyone with access to the Internet by putting the List of Parties Excluded from Federal Procurement and Nonprocurement Programs on its webpage. The list is in searchable database form and can be accessed at **http://www.arnet.gov/epls/** .

A password is not required to access the site, but all users must register prior to entry. The book will still be published, but the website is the most up-to-date resource. GSA plans to include entities in the on-line list within twenty-four hours after GSA receives notification from an agency of the suspension or debarment action.



Air Force Procurement Fraud Cases

(April 1997 through September 1997)



JEOPARDY! JEOPARDY!

Recent cases reveal that double jeopardy issues continue to arise in the fraud area. We'll take a look at the landmark Supreme Court case in this area, and then play Double Jeopardy.

Double jeopardy applies to multiple punishments for the same offense and is prohibited by the Fifth Amendment of the Constitution. In United States v. Halper, 490 U.S. 435 (1989), the manager for a medical laboratory was convicted of fraud, sentenced to two years in prison and fined $5,000. The Government later sued the manager under the False Claims Act (FCA) for multiple false billings and sought actual damages of $585 plus a civil penalty of $130,000. The Supreme Court ruled that the proposed civil penalty under the FCA, being so disproportionate to actual damages, was not remedial in nature but was actually "punishment." The civil penalty bore no "rational relation" to the Government's loss and costs of investigation. Since the defendant had already been punished in the criminal proceeding, the Government was barred from seeking a second punishment in the civil proceeding. Now let's play Double Jeopardy!

Answer #1: A defendant was convicted, sentenced to twenty-four months in prison, and ordered to pay restitution of $153,476 for submitting false billings. The Government brought suit against the defendant under the FCA and obtained a judgment of $460,428 (treble damages) and $20,000 in penalties ($5,000 for each of the four false claims). (He was given a credit for his criminal restitution.)

Question #1: You were correct if you asked: "What is not double jeopardy?" United States v. Peters, 110 F.3d 616 (8th Cir. 1997). Stating that the important question is how the civil penalty relates arithmetically to the total damages caused, the court pointed out that the ratio in Halper was 224:1. Here, the ratio was less than 1:1. Therefore, defendant had not been subjected to double jeopardy.

Answer #2: Defendant was debarred by the Army for twenty-six months for overstating his subcontractor's bills, causing Government losses of between $40,000 and $60,000. Defendant was then criminally indicted for this same conduct and filed a motion to dismiss the indictment.

Question #2: You were correct if you asked: "What is not double jeopardy?" United States v. Hatfield, 108 F.3d 67 (4th Cir. 1997). Debarment was designed to be a civil proceeding, and a twenty-six month debarment for the losses caused the Government was not so unreasonable as to make the debarment a punishment. Significantly, the court doubted that any debarment within the three year guideline in the FAR could present a case sufficiently punitive to implicate the double jeopardy clause.

Double jeopardy will most likely be implicated in situations where there are repeated false claims for small amounts of money, thus allowing the potential for civil penalties to greatly exceed the Government's loss. So keep in mind these double jeopardy rules when you are confronted with what the Supreme Court has called the "prolific small gauge offender."

DEFENSE COMPANIES ENGAGE IN FRAUD PREVENTION

How do defense contractors keep themselves out of trouble and show the world they want to do the right thing? One way is through participation in the Defense Industry Initiative (DII). The DII is a group of ethics and compliance principles subscribed to by more than forty defense companies. In signing the DII, companies pledge to do such things as institute codes of ethics, provide ethics training to their employees, and create mechanisms for internal reporting and self-governance.

The DII grew out of concern in the 1980s about the number and magnitude of investigations into improper practices in the defense industry. When the Packard Commission, created by President Reagan, recommended that defense contractors promulgate and enforce codes of ethics and develop and implement internal controls, the defense industry

responded with the DII.

In order to promote industry-wide cooperation, to share experiences, and to discuss matters of business ethics, conduct, and compliance with laws and regulations, the DII signatories convene at an annual Best Practices Forum. On June 5 and 6, 1997, the DII held its 12th Best Practices Forum. Along with representatives from signatory companies in attendance, DII invited representatives from each of the military departments. At the Forum, a group of professional actors performed skits to generate discussions about ethical decisions, companies displayed tools they use for ethics training, and suspension and debarment officials from each military service spoke on a panel about present responsibility.

With the commitment of defense companies to the principles discussed at the Forum, we hope to see fraud as a small exception to the general rule of honest dealings with the Government.

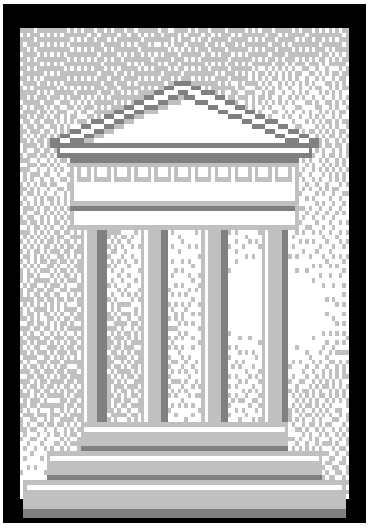
THE SUPREMES RULE ON THE FALSE CLAIMS ACT

On June 16, 1997, the Supreme Court, in its first decision on the False Claims Act since the 1986 amendments were enacted, ruled that the amendments do not apply retroactively. Hughes Aircraft Company v. United States ex rel. Schumer, 117 S. Ct. 1871, 65 U.S.L.W. 4447 (1997).

Facts: Schumer alleged Hughes improperly charged costs from its fixed-price F-15 subcontract with McDonnell Douglas to its cost-plus B-2 subcontract with Northrop. The cost mischarging took place between 1982 and 1984, and the Government knew about the mischarging when the Defense Contract Audit Agency performed audits and prepared reports on the issue between 1986 and 1988. Schumer filed his *qui tam* suit in 1989.

Law: Under the pre-1986 False Claims Act, a court had to dismiss a *qui tam* action if it was based on information the Government knew when the action was brought. (Schumer conceded his suit must be dismissed under this law.) Under the 1986 amendments to the False Claims Act, courts do not have jurisdiction over a *qui tam* action based upon allegations which have been publicly disclosed unless the relator is an original source. An original source is a person who has independent knowledge of the information upon which the allegations are based and has voluntarily provided the information to the Government.

Supreme Court Ruling: In ruling in Hughes' favor, the Supreme Court applied the "time-honored presumption against retroactive legislation unless Congress has clearly manifested its intent to the contrary" and ruled that the 1986 amendments are not retroactive because nothing in the amendments evidences a clear intent for them to be applied retroactively.



(*Note*: Had the Court ruled in Schumer's favor on the retroactivity issue, it would then have had to apply the 1986 amendments and consider Hughes' defense that the release of Government audit reports to Hughes' employees was a public disclosure.)

REFER IT TO SAF/GCR

The Office of the Deputy General Counsel (Contractor Responsibility) (SAF/GCR) is interested in reviewing for possible suspension and debarment action all cases in which an attorney from the criminal division of the Department of Justice or an United States Attorney's Office has declined to pursue criminal prosecution. The rationale is that if an investigator believes the case is strong enough to present for criminal prosecution in which the burden of proof is beyond a reasonable doubt, the case may be ripe for administrative action in which the burden of proof is lower. Additionally, SAF/GCR is interested in reviewing all civil fraud settlements for possible suspension or debarment action.

Please refer all procurement fraud cases in these two categories, as well as any other set of facts which may demonstrate that a contractor is not presently responsible, for possible suspension or

debarment action. Working together we can ensure we don't do business with companies who are not honest in their dealings with the Government. SAF/GCR can be reached at DSN 223-9820 or (703) 693-9820.

THE RELATOR: GOVERNMENT REPRESENTATIVE?

A person who files a *qui tam* action (known as a relator) does so "for the person and for the United States Government," and the action must be brought "in the name of the Government." 31 U.S.C. § 3730(b)(1). If the action is successful, the Government receives the majority of the recovery. (The relator's bounty is only 15% to 30% of the recovery). 31 U.S.C. § 3730(d). Do these factors allow the relator to be treated as a representative of the United States?

Consider the situation in which the Government has declined to intervene, and the court has granted the defendant's motion for summary judgment. The Federal Rules of Appellate Procedure allow 30 days for an appeal, except the United States is allowed 60 days. Is the relator's appeal timely if filed after 30 days? No, according to the 10th Circuit. United States ex rel. Petroflsky v. Van Cott, Bagley, Cornwall, McCarthy, 588 F.2d 1327 (10th Cir. 1978). Yes, according to the 9th Circuit. United States ex rel. Haycock v. Hughes Aircraft Co., 98 F.3d 1100 (9th Cir. 1997), citing the factors mentioned in the previous paragraph.

Consider the case in which the Government has declined to intervene, and the relator wants to call a former Government employee as an expert witness. Except pursuant to court order, former Government employees are subject to criminal punishment if they serve as expert witnesses for anyone except the United States in a matter in which they were personally and substantially involved while a Government employee. 18 U.S.C. § 207. In a pending case, the relator is arguing that this criminal law does not apply because the expert witness would be testifying on behalf of the United States since the *qui tam* action is brought in part "for the United States Government."

There is no doubt that the interests of the relator and the United States may diverge not only in declined cases but also in cases where the Government has intervened. For example, in a declined case, the Government may object to a settlement between the relator and defendant. 31 U.S.C. § 3730(b)(1). Typically, the Government does so when the settlement allocates a disproportionate share of the settlement proceeds to a state cause of action (such as a wrongful termination claim) found in the False Claims Act suit. (A relator may do this to maximize the amount of the settlement that he or she, as opposed to the Government, will receive.)

In cases in which the Government has intervened, the Government may later move for dismissal (the relator has an opportunity for a hearing on the motion), 31 U.S.C. § 3730(c)(2)(A); the Government may settle a case with a defendant despite the relator's objections (the relator has an opportunity for a hearing), 31 U.S.C. § 3730(c)(2)(B); the Government has the "primary responsibility" for litigating the case, 31 U.S.C. § 3730(c)(1); and the court may impose limitations on the relator's participation in the litigation, 31 U.S.C. § 3730(c)(2)(C).

Bottom line: Don't assume that because the Government and relator will share in any recovery that the interests of the relator and Government are necessarily aligned.

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